**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
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| **KENNETH BROWN,** | : | **CIVIL ACTION** |
| **Petitioner** | : | |
| | : | |
| | : | |
| **v.** | : | |
| | : | |
| **LOUIS FOLINO, et al.** | : | |
| **Respondents** | : | **NO. 03-4950** |

**MEMORANDUM AND ORDER**

**Norma L. Shapiro, S.J.** **May 28, 2004**

**I. INTRODUCTION**

Petitioner Kenneth Brown ("Brown"), a state prisoner serving a life sentence at the State Correctional Institution at Waynesburg, PA ("Waynesburg"), has filed a petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

The petition was referred to United States Magistrate Judge Thomas J. Rueter ("Judge Rueter"), who filed a Report and Recommendation ("R&R") that the petition be denied and no certificate of appealability be granted. (Paper No. 12).

Brown filed timely objections to the R&R. After de novo review of the claims, this court finds that trial counsel was not ineffective, and there is no reasonable probability the trial outcome would have been different had counsel been more effective.

**II. BACKGROUND**

Cynthia Linthicum ("Linthicum") was found dead, brutally beaten and stabbed. Brown, the last person seen with Ms. Linthicum before her death, told police that he was not in the victim's bedroom on the night of the murder. A trash bag containing a knife with blood on it, a wad of blood-stained tissues, credit cards and a social security card belonging to the victim were found in Brown's apartment. An analysis of the blood on the knife determined that the blood belonged to the victim. Brown's saliva was found on the victim's breast.

Following a jury trial in the Court of Common Pleas of Montgomery County, Pennsylvania, Brown was convicted of first-degree murder, robbery, possession of instruments of crime, aggravated assault, and theft of movable property (No. 1163-94).

Brown was sentenced to life in prison without parole for first-degree murder, plus consecutive sentences for the other offenses. The Superior Court affirmed, and the Pennsylvania Supreme Court denied Brown's request for allowance of appeal. Commonwealth v. Brown, 700 A.2d 1022 (Pa. Super. Ct.) (unpublished memorandum), appeal denied, 701 A.2d 574 (Pa. 1997)(unpublished table decision).

Brown filed a pro se petition under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541, et seq., with the Court of Common Pleas, and new counsel was appointed to

represent Brown. The judge dismissed the PCRA petition on June 4. Commonwealth v. Brown, No. 1163-94 (C.P. Mtgy. Cty., Nov. 13, 2001). The Superior Court affirmed, Commonwealth v. Brown, 823 A.2d 1022 (Pa. Super. Ct. 2003)(table), and the Pennsylvania Supreme Court denied Brown's request for allowance of appeal. Commonwealth v. Brown, 827 A.2d 1200 (Pa. 2003)(table).

Brown filed a petition for writ of habeas corpus alleging ineffective assistance of trial counsel for failing to:

1. Object to trial court's definition of reasonable doubt which denied petitioner due process of law.

2. Object to the summation of the prosecutor, which placed burden of persuasion on the defendant as to his version of events and his alibi.

3. Show that the DNA found on the bloody knife suggested the presence of a third party.

4. Object to the trial court's progression charge[1] on grounds that it was coercive and prevented the jury from considering lesser offenses.

Brown also alleged ineffective assistance of PCRA counsel for failing to raise all these issues in the PCRA petition. (Paper No. 1).

Brown objects to Judge Rueter's disposition on trial counsel's failing to object to: 1) the reasonable doubt instruction; 2) the prosecutor's closing argument. Brown asserts the jury instructions did not cure the prejudice from the

[1] The judge instructed the jury to consider first-degree murder first, before "progressing" to second-degree murder, and to consider second-degree murder before manslaughter.

prosecutor's closing argument.

## III. DISCUSSION

### A. Habeas Corpus and Ineffective Assistance Standards

#### 1. Habeas Corpus Standards

Brown's habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2254 (d)(1) and (2).[2]

Federal habeas petitioners are entitled to relief when independent federal review shows "the state court arrive[d] at a conclusion opposite to that reached by this Court on a question of law, or . . . on a set of materially indistinguishable facts" Williams v. Taylor, 529 U.S. 362, 413 (2000). Such relief is available only in cases in which a federal court arrives at "a firm conviction that [the state court] judgment is infected by constitutional error." Id. at 389. See also Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 888 (3d Cir.)(en banc), cert. denied, 528 U.S. 824 (1999)("[I]t is not sufficient for the

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[2] In relevant part, the Act states:

(d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d)(1) and (2)

[habeas] petitioner to show merely that his interpretation of [federal law] is more plausible . . . rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome")(emphasis in original).

The "unreasonable application" clause precludes a federal court from issuing a writ of habeas corpus unless the state court decision is objectively unreasonable. Williams, 529 U.S. at 411. See Matteo, 171 F.3d at 891 (1999)(holding habeas petition should only be granted if "the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified").

**2. Standard for Effectiveness of Counsel**

To establish constitutionally defective counsel, Brown must show: 1) that trial counsel's performance fell well below an objective standard of effectiveness; and 2) that there exists a reasonable probability the result of the trial would have been different, had he had effective counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984).

In determining whether counsel has been effective, the standard is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. The reviewing court should be "highly deferential" and must make

"every effort . . . to eliminate the distorting effects of hindsight . . ., and to evaluate the conduct from counsel's perspective at the time." Id. at 689. The Constitution does not guarantee defendants the best counsel, only adequate counsel. Id. at 687

Counsel's ineffectiveness must have an impact on the judgment. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 696. A different outcome must not be merely possible, but probable. McNeil v. Cuyler, 782 F.2d 443, 451 (3d Cir. 1986).

This extends to counsel's exercise of discretion in making questionable claims and raising objections. See United States v. Sanders, 165 F.3d 248 (3d Cir. 1999)(holding no Sixth Amendment right to counsel violation for counsel's failing to raise meritless claim).

If a petitioner's arguments fail on either prong of the Strickland test, the entire claim fails. "There is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697.

**B. Brown's Claims**

**1. Instructions on Reasonable Doubt**

Brown first claims his due process rights were infringed

when trial counsel did not object to the jury instruction on the definition of reasonable doubt. Brown focuses on one sentence within the five-paragraph explanation of reasonable doubt, a sentence which merely offers an example to clarify the concept. The trial court charged:

> . . . A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to pause and hesitate before acting upon a matter of importance in his or her own affairs.
>
> It is not a mere hesitation. A mere hesitation in and of itself is not a reasonable doubt. But a hesitation concerning the guilt of the defendant may become a reasonable doubt when and if that hesitation becomes a restraint, and would then cause you to be restrained from acting in a matter of the highest importance in your own life.
>
> A reasonable doubt must fairly arise out of the evidence that was presented or out of the lack of evidence presented with respect to some element of the crime. A reasonable doubt must be a real doubt. It may not be an imagined one, nor may it be a doubt manufactured to avoid carrying out an unpleasant duty.
>
> You may not find the defendant guilty based on speculation or guesswork or on mere suspicion of guilt.
>
> . . .
>
> On the other hand, if the Commonwealth does not meet its burden, then you must find the defendant not guilty.

N.T, Nov. 21, 1994, at 825-28 (emphasis added). Brown claims that the underlined phrase mandated a higher standard of doubt than is constitutional.

In Victor v. Nebraska, 511 U.S. 1 (1994), the Supreme Court upheld a jury instruction defining reasonable doubt as

> a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true . . . . A reasonable doubt is an actual and substantial doubt, . . . as distinguished from a doubt arising from mere possibility . . . .

Id. at 18. See also Commonwealth v. Kluska, 3 A.2d 398 (Pa. 1939).

The trial court's definition here follows the Victor court's definition. The initial paragraph sets out the hesitation aspect of reasonable doubt: "a doubt that would cause a reasonably careful and sensible person to pause and hesitate before acting upon a matter of importance."

The second paragraph explains the "real doubt" qualification of reasonableness: "It is not a mere hesitation." This was approved in Victor. 511 U.S. at 21 (upholding instruction "A reasonable doubt is an actual and substantial doubt . . . as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.").

Brown reads the "restraint" language as superceding all other explanation of the reasonable doubt standard, including instructions both before and after that term. He cites Cage v. Louisiana, 498 U.S. 39 (1990), in which the Court held invalid a jury instruction defining a real doubt as one that "must . . . give rise to grave uncertainty . . . . What is required is not an absolute or mathematical certainty, but a moral certainty." Id. at 40 (citing court's instruction). Brown argues that the

instruction in the present case is equivalent to the invalid instruction in Cage, because it heightens the standard for reasonable doubt.

Many cases support use of the word "restraint" to describe "real" doubt. The Pennsylvania Supreme Court has approved instructions virtually identical to these instructions (including the word "restraint" with reference to "real" doubt). See Commonwealth v. Hawkins, 787 A.2d 292, 301 (Pa. 2001), Commonwealth v. Ragan, 743 A.2d 390, 401 (Pa. 2000), Commonwealth v. Young, 317 A.2d 258, 261-62 (Pa. 1974), Commonwealth v. Donough, 103 A.2d 694, 697 (Pa. 1954).

In Laird v. Horn, 159 F. Supp. 2d 58 (E.D. Pa. 2001), the court approved a similar instruction on habeas review: "A reasonable doubt is a doubt that would restrain a reasonably careful and sensible person from acting upon a matter of importance in his or her own affairs." Id. at 91-92 (quoting the trial court). Use of the term "restraint" to clarify the reasonable doubt standard is not prejudicial; trial counsel was not ineffective for failing to object to the instruction.

The charge must be evaluated as a whole. In Victor, the Supreme Court held the constitutional requirement to be: "taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury." 511 U.S. at 5 (modification in

original). Here, the judge simply provided an example of a real doubt, to clarify that an imagined or contrived doubt was not a reasonable doubt.

The instruction in this case matched the valid instruction in Victor, and not the invalid one in Cage. The instruction did not require the doubt to be a restraint, but explained that a doubt acting as a restraint was a reasonable doubt. Trial counsel was not ineffective for failing to object.

**2. "Prejudicial" Comments by the Prosecutor**

Brown argues that his trial counsel was ineffective for failing to object to prejudicial comments by the prosecutor. Brown asserts that the prosecutor shifted the burden of persuasion to the defense with regard to his alibi and his version of events. Brown further contends that the trial court's instruction on burden of persuasion was insufficient to cure prejudice caused by the prosecutor. These objections fail for three reasons. First, the comments were not prejudicial, but valid argument by the prosecutor. Second, even if they were prejudicial, the comments are allowed under the "invited response" rule. Third, the jury instructions were sufficient to cure any prejudice.

Defense counsel, discussing the defendant's version of events during closing arguments, stated:

> [Brown] gave you the only testimony, explanation as to the trash bag. Either you believe him or you don't. I

suggest there is no evidence to the contrary.

N.T. Dec. 12, 1994, at 738. The prosecutor, responding in his closing, stated:

> You can either believe it, or disbelieve it. And I will submit to you, that if you disbelieve it, you cannot buy any version of what happened from him. And I submit that you will have to find him guilty of murder.

Id. at 756

Prosecutors are allowed to "argue to the jury that the evidence establishes the guilt of the defendant." Commonwealth v. Kaufman, 452 A.2d 1039, 1043 (Pa. Super. Ct. 1982). While the prosecutor cannot state his personal opinion as to the guilt of the defendant, he is allowed to point to evidence (or a lack of evidence) supporting his case. Id. at 1043. The prosecutor here did exactly that. Rather than shifting the burden of persuasion to the defendant, the prosecutor's comments merely punctuated his summary of the facts that followed the statement in question. See N.T., Nov. 21, 1994, at 756-88. General argument is not prejudicial.

The prosecution is permitted to respond to assertions by defense counsel. The "invited response" rule permits the challenged remarks of the prosecutor to be weighed in light of earlier remarks of defense counsel: "[I]f the prosecutor's remarks were 'invited,' and did no more than respond

substantially to 'right the scale,' such comments would not warrant reversing a conviction." United States v. Young, 470 U.S. 1, 12-13 (1985).

Here, defense counsel used the defendant's testimony to challenge the prosecution's theory of the case. The prosecutor properly responded by questioning the defendant's testimony, and then detailing the evidence that contradicted it. N.T., Nov. 21, 1994, at 756-67. Even Brown admits a close link between statements on the defendant's testimony by defense counsel and the prosecutor. Petitioner's Objections to the Report and Recommendation, Nov. 14, 2003, at 14, n. 3. This link shows that the prosecutor's statement was invited, and thus not prejudicial.

Regardless of whether the prosecutor's statement was prejudicial, or uninvited, the jury instructions cured any prejudice. The Superior Court and the Pennsylvania Supreme Court held that the trial judge "properly instructed the jury that the Commonwealth had the burden of proving [Brown] guilty beyond a reasonable doubt, and [Brown] had no burden to prove his innocence." Commonwealth v. Brown, No. 1592 EDA 2001, slip op. at 10 (Pa. Super. Ct. March 3, 2003). That instruction clearly outweighed any comments by the prosecutor; "arguments of counsel generally carry less weight with a jury than do instructions from the court." Boyde v. California, 494 U.S. 370, 384 (1990). See

also United States v. Paul, 175 F.3d 906, 912 (11th Cir.), cert. denied, 528 U.S. 1023 (1999)(holding trial court's instruction on burden of proof "cured any prejudice" caused by prosecutor's closing remarks that shifted burden to defendant). Counsel was not ineffective for failing to object to the prosecutor's closing remarks about defendant's lack of credibility.

Brown also argues the general charge to the jury on witness credibility supported the prosecutor's improper comments. However, the instruction on witness credibility followed the suggested Pennsylvania Standard Jury Instruction. The customary charge instructs jurors to evaluate testimony for truth and determine the real facts of the case. See Commonwealth v. Snoke, 580 A.2d 295, 299 (Pa. 1990)(approving charge similar to that in the present case). It is incorrect to read anything more into the standard jury charge. The instructions were not prejudicial; counsel's failing to object to them was likewise not prejudicial.

The second prong of the Strickland test for ineffectiveness of counsel requires the probability of a different outcome at trial with effective counsel. The trial judge admonished the jury that "neither the opening statements or closing arguments of counsel constitute the law that you will apply in this case, nor are they part of the evidence and you should not consider them as such." N.T., 12/21/94, at 805. The trial judge explicitly set

the burden of proof on the prosecution by stating: “it is the Commonwealth that always has the burden...” N.T., 12/21/94, at 826. These instructions cured any possible prejudice caused by the prosecutor’s closing. The outcome would have been no different at trial without the allegedly objectionable remarks. Counsel was not ineffective for failing to object to them.

**IV. CONCLUSION**

For the reasons detailed above, petitioner Kenneth Brown’s objections to the Report and Recommendation are overruled. An appropriate order follows.

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**ORDER**

AND NOW, this ___ day of May, 2004, upon consideration of petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (Paper No. 1), United States Magistrate Judge Thomas J. Rueter's Report and Recommendation (Paper No. 12), Petitioner's Objections to Magistrate Judge's Report and Recommendation (Paper No. 15), for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. The Report and Recommendation (Paper No. 12) is **APPROVED AND ADOPTED**;

2. Petitioner's Objections to Magistrate Judge's Report and Recommendation (Paper No. 15) are **OVERRULED**;

3. Petitioner's Petition for Writ of Habeas Corpus by a person in State Custody (Paper No. 1) is **DENIED**;

4. There is no probable cause to issue a certificate of appealability;

5. The Clerk of the Court shall mark this case closed for statistical purposes.

_____
S.J.